

PD-0639-18

FILED  
COURT OF CRIMINAL APPEALS  
11/5/2018  
DEANA WILLIAMSON, CLERK

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# IN THE TEXAS COURT OF CRIMINAL APPEALS

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**DAVID R. GRIFFITH**  
Petitioner

v.

**THE STATE OF TEXAS**  
Respondent

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ON DISCRETIONARY REVIEW FROM THE TENTH COURT OF APPEALS  
APPEAL FROM THE COUNTY COURT AT LAW OF NAVARRO COUNTY, TEXAS  
THE HONORABLE AMANDA PUTMAN, JUDGE PRESIDING

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**STATE'S BRIEF**

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ORAL ARGUMENT  
NOT REQUESTED

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## **CORRECTED IDENTIFICATION OF PARTIES**

Respondent, the State of Texas, adopts Petitioner's identification of parties and counsel, with the following corrections:

Appellate counsel for Respondent, the State of Texas, are Robert Linus Koehl and Will Thompson.

James Kingman and Amy Cadwell are no longer involved in the instant case.

R. Lowell Thompson is deceased.

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## **STATEMENT REGARDING ORAL ARGUMENT**

This Court granted review but did not grant oral argument. The State does not request oral argument.

## **STATEMENT REGARDING ABBREVIATIONS TO PROTECT IDENTITY**

Although Petitioner used abbreviations to describe most of the parties in this case, he identified the child victim by her name on page 44 of his brief. As such, the State believes that any further use of abbreviations in the briefing would be futile. The State will refer to the child victim in this case as “the victim” and will refer to all other witnesses by their names. The State will also request that this Court order both briefs sealed to protect the victim’s identity.

## **ISSUE PRESENTED**

The State presented evidence that the victim attempted to outcry to her mother after the second abuse incident. The State presented evidence that this attempted outcry occurred prior to her mother separating from Petitioner in January 2013. Was this sufficient for a reasonable fact-finder to determine without speculation that the second instance of abuse occurred prior to the victim’s fourteenth birthday, four months later in April 2013?

## **SUMMARY OF THE ARGUMENT**

The State presented sufficient evidence for a reasonable fact-finder to determine without speculation that the second incident happened in January 2013. The jury heard testimony that the victim attempted to outcry to Donna Griffith about the second incident, and that Donna Griffith separated from Petitioner for unrelated reasons after this attempted outcry. Donna Griffith testified that the date she separated from Petitioner was in January 2013. From this, a reasonable fact-finder could deduce that the second incident happened in January 2013, prior to the victim's fourteenth birthday in April 2013.

## **ARGUMENT AND AUTHORITIES**

When the State alleges continuous sexual abuse of a child under fourteen, it must prove *inter alia* that two or more acts of sexual abuse occurred prior to the victim's fourteenth birthday. TEX. PENAL CODE § 21.02(b); *Williams v. State*, 305 S.W.3d 886, 889 (Tex. App.—Texarkana 2010). Outcry testimony alone is sufficient to prove each element testified to. *See Rodriguez v. State*, 819 S.W.2d 871, 873-74 (Tex. Crim. App. 1991). This is true even when the child later recants and contradicts the outcry. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). The fact-finder may reasonably infer elements from the

evidence presented and resolve contradictory evidence and testimony. *Laster v. State*, 275 S.W.3d 512, 522-23 (Tex. Crim. App. 2009). In other words, the fact-finder may consider the facts presented and deduce logical conclusions from them. *Hooper v. State*, 214 S.W.3d 9, 15-16 (Tex. Crim. App. 2007). But a fact-finder may not speculate or make factually unsupported inferences. *Id.*

In the present case, Petitioner claims that the State failed to present evidence demonstrating that the second incident occurred prior to the victim's fourteenth birthday. Pet'r Br. 33.

The State presented sufficient evidence for a reasonable fact-finder to determine *without speculation* that the second incident occurred in January 2013. Specifically, the State provided Lydia Bailey's testimony detailing the second abuse incident. 11 RR 29. As part of her testimony, she stated that the victim had tried to tell her mother about the second incident, but that her mother laughed it off. *Id.* at 31. Donna Griffith (the victim's mother) also testified and presented a toned-down version of the victim's attempt to outcry right after the second incident. 10 RR 35-40. A comparison of Ms. Bailey's and Ms. Griffith's version of events would allow a reasonable juror to determine that they were talking about

the same incident, with Donna Griffith attempting to downplay the attempted outcry.

<b>Lydia Bailey's Testimony</b>	<b>Donna Griffith's Testimony</b>	<b>Record Citations</b>
The victim woke up and Petitioner was trying to take her shirt off. She told him to stop. He touched her breast. He also put his hand down her pants and digitally penetrated her.	Petitioner came to the victim in the middle of the night and put his hand on her stomach.	11 RR 29 (Bailey) 10 RR 36-37 (Griffith)
Petitioner drugged the victim with Ambien to make her sleep.	The victim was abusing Ambien and having hallucinations.	11 RR 31 (Bailey) 10 RR 36-37 (Griffith)
The victim's mother laughed it off when the victim tried to outcry.	Ms. Griffith did not take the allegation seriously because the victim was hallucinating.	11 RR 31 (Bailey) 10 RR 36-37 (Griffith)

Ms. Griffith further testified that she left Petitioner for unrelated reasons after the attempted outcry. 10 RR 35-36.

Q. After she told you this, did you leave David for a little while?

A. Not for that.

Q. Oh, it was for something else?

A. Yes.

Q. Okay. But you left him when—January of 2012?

A. No.

Q. No? When was it that you did leave him for a little while?

A. That would have been January of—well, maybe it was January of 2012. Yes it was.

10 RR 35.



While Ms. Griffith repeatedly stated that this all occurred in January 2012, she later clarified on cross-examination that it actually happened *in January 2013*. 10 RR 73.

A reasonable fact-finder could deduce that the second incident happened in January 2013 from the fact that Ms. Griffith left Petitioner in January 2013, after the attempted outcry about the second incident. The incident occurred after the family moved to Frost. 10 RR 256. This move happened around January 2013. *Id.* at 73, 106. The victim attempted to outcry to her mother. A comparison of Lydia Bailey and Donna Griffith’s testimony show that the attempted outcry was for the second incident. *See supra*. Ms. Griffith left Petitioner in January 2013 after the attempted outcry. *See Id.* at 35-40. So a reasonable jury could deduce that the second incident was in January 2013. This was prior to the victim’s fourteenth birthday in April 2013. As such, there was sufficient evidence for a reasonable jury to find Petitioner guilty.

The Tenth Court of Appeals agreed. The Tenth Court of Appeals noted in its decision that “Donna also testified that she separated from Griffith after A.G.’s accusation—beginning sometime in January 2013.” *Griffith v. State*, 10-14-00245-CR; 2018 Tex. App. LEXIS 2407; 2018 WL 1631651 (Tex. App.—Waco, Apr. 4,

2018) (mem op. not designated for publication) (emphasis added). Yet Petitioner argues that this would still require the Court to “speculate that a second act occurred in January, February, March, or the first four days of April 2013 instead of the later twenty-six days of April, or in May or June of 2013.” Pet. for Discretionary Review 25-26; *see also* Pet’r Br. 33. Petitioner’s argument contradicts the record, which demonstrates that Ms. Griffith separated from Petitioner *after* the second instance of abuse, *beginning* in January 2013. *See* 10 RR 35-40, 73. As such, Petitioner’s sole issue fails.<sup>1</sup> Accordingly, this Court should overrule Petitioner’s sole issue and affirm the conviction.

### **PRAYER**

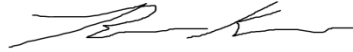
The Tenth Court of Appeals properly determined that evidence was sufficient in the instant case. The State presented sufficient evidence at trial for a reasonable fact-finder to determine without speculation that both instances of abuse occurred prior to the victim’s fourteenth birthday.

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<sup>1</sup> Petitioner also attempts to re-assert an issue on which this Court did not grant review in his first footnote. Because this Court did not grant review on Petitioner’s remaining issue, the State does not respond. But if the Court chooses to entertain this issue, the State requests the opportunity to respond.

WHEREFORE PREMISES CONSIDERED, Respondent the State of Texas respectfully requests that this Court affirm the 10th Court of Appeals in this case. The State also respectfully requests that the Court order both briefs sealed to protect the victim's identity.

Respectfully Submitted on November 2, 2018,




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## **CERTIFICATE OF SERVICE**

The undersigned has e-served Niles Illich, counsel for the Petitioner, through the eFileTexas.gov filing system and emailed a courtesy copy on the 2nd day of November, 2018. The undersigned has e-served the State Prosecuting Attorney's Office through the same filing system and emailed a courtesy copy as well. The undersigned will prepare and dispatch ten paper copies of the preceding brief to the Court within the next three days.

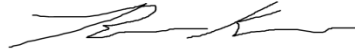


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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitations in Tex. R. App. P. 9.4(i)(2). In reliance on the word count provided by the computer program used to draft this brief, the undersigned attorney certifies that this brief contains 1,721 words. This brief uses 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes and tables.



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